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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 829.

GIUSEPPE BOLOGNA,
Appellant,

vs.

HAZEL MORRISSEY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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Moving to dismiss the appeal, Appellee submits that: "There was no original 'Louisiana Contract' of sale and the whiskey was not 'bought in Louisiana'." Appellee then cites 11 Am. Jur. 395, Section 113, to support the contention that "the place of delivery is generally the place where the executed contract is deemed to have been made".*

*Though Appellant largely anticipated and covered in his Jurisdictional Statement the matters now brought to the fore by Appellee (particularly at pages 9 and 10 thereof) this brief response may well prove to be time-saving to this Court, as well as to properly emphasize the correctness of Appellant's position.

The Supreme Court of Mississippi did not find that this was not a Louisiana contract. That Court recognized in its opinion that the trier of the facts had expressly found "that these instruments (the deeds of trust which, by the decision here appealed from, stand cancelled) evidenced the debts of * * * Mike T. Morrissey for whiskey *which he purchased in Louisiana and transported to Mississippi for resale*". (A3 of "Jurisdictional Statement", 123 So.2d 540)

This finding of fact that Morrissey bought the liquor in Baton Rouge, Louisiana, which was there loaded on Morrissey's own trucks and by Morrissey transported into Mississippi not only finds support in the Record, but is an uncontradicted fact. But two people testified on this feature.

The purchaser, Morrissey, answering a question put by his own counsel, swore:

> "* * * I will venture to say that during that month we turned over approximately a half a million dollars of merchandise—during that period of time, I had a check or two to bounce, and Bologna Brothers—of course we were buying whiskey from Bologna Bros., we were buying whiskey from Strauss, buying whiskey from Glazier, and from other wholesalers *in Louisiana*, * * *." (Appeal Record, pp. 139-140)

See additional quotations from Morrissey's testimony A25 and A26 of Jurisdictional Statement.

The seller, Bologna, concurred that "they (Morrissey and his ilk) come and get it, and we bill it to the places where they go." (Appeal Record, p. 357) And Bologna further testified, as we quote:

> "Q. Tell the Court how Mr. Morrissey would come over and get the whiskey he did get?

A. He used to call at the office and give me the order, and send a truck with power of attorney to load the truck *and have the truck pick up between $20,000 and $25,000 of merchandise.*

Q. Where is your place of business?

A. Baton Rouge.

Q. And he would send *his truck* down there and get it, is that right?

A. Yes, that's right.

Q. Would you sell him for cash or credit?

A. He used to send a check with the truck driver, when we feel like loading we get the check, and for a while the checks were O.K., and around 1953 they started bouncing back.

Q. So you were making these sales for cash at the place the whiskey was delivered– at Baton Rouge?

A. Yes." (Appeal Record, p. 360)

* * *

"Q. You had no interest in what he was doing with his whiskey?

A. No, after it got on the truck, the whiskey belonged to him after it leaves my place (referring to Bologna's place in Baton Rouge, Louisiana).

Q. It was his?

A. Yes.

Q. And you had no interest in what he did with it?

A. No, sir.

Q. That is the way it was?

A. Yes, *that is the way it was.*" (Appeal Record, p. 363)

The State Supreme Court did not find that the trier of facts erred in concluding that Morrissey bought the whiskey in Louisiana and then himself transported it therefrom to Mississippi for resale. Bologna and Morrissey both swore that "that is the way it was", and that is what and all that the Record shows.

As this Court said in *Creswill* v. *Grand Lodge K. of P.*, 225 U.S. 246. 56 L. Ed. 1074:

"* * * While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; * * *."

Otherwise in *Sterling* v. *Constantin*, 77 L. Ed. 375, 287 U.S. 378:

"* * * Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right. Kansas City S. R. Co. v. H. Albers Commission Co., 223 U.S. 573. 591, 56 L. ed. 556, 565, 32 S. Ct. 316; Creswell v. Grand Lodge K. P., 225 U.S. 246, 261, 56 L. ed. 1074, 1080, 32 S. Ct. 822; Northern P. R. Co. v. North Dakota, 236 U.S. 585, 593, 59 L. ed. 735, 740, L.R.A. 1917F, 1148, P.U.R. 1915C, 277, 35 S. Ct. 425, Ann. Cas. 1916A, 1; Union P. R. Co. v. Public Serv. Commission, 248 U.S. 67, 69, 63 L. ed. 131, 132, P.U.R. 1919B, 315, 39 S. Ct. 24; Merchants' Nat. Bank v. Richmond, 256 U.S. 635, 638, 65 L. ed. 1135, 1137, 41 S. Ct. 619; First Nat. Bank v. Hartford, 273 U.S. 548, 552. 553, 71 L. ed. 767, 770, 771, 59 A.L.R. 1, 47 S. Ct. 462; Fiske v. Kansas, 274 U.S. 380, 385, 386, 71 L. ed. 1108, 1110, 1111, 47 S. Ct. 655."

All the facts of record show that this was a Louisiana contract. The decision of the Mississippi Court, here ap-

pealed from, failed to give any faith and credit to the laws of Louisiana and went on to impair and to nullify that Louisiana contract, taking from this Appellant a debt which was truly to him owing. We are not here confronted with a case where a state court refused, on grounds of its public policy, to enforce a contract made elsewhere but we here have a case where the state court *at the instance of a third party to the deal*, affirmatively struck down a Louisiana contract based upon the application thereto of a Mississippi statute.

That this appeal should be entertained and dealt with upon the merits thereof is

Respectfully submitted,

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